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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1966

NO. 241

NATIONAL BELLAS HESS, INCORPORATED,

Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLEE

Opinion Below

The opinion of the Supreme Court of Illinois (R. 86-99) is reported at 34 Ill. (2d) 164, 214 N.E. 2d 755.

Jurisdiction

This action was brought against Appellant as an action in debt pursuant to applicable provision, specifically Section 439.8, of the Illinois Use Tax Act, (Ill. Rev. Stat.,

(1963) Ch. 120, Section 439.1 et seq.,) and the Illinois Sales Tax or Retailers' Occupation Tax. (Ill. Rev. Stat., (1963) Ch. 120, Section 440 et seq.)

The judgment of the Supreme Court of Illinois was entered on January 25, 1966 (R. 100). Notice of appeal was filed in the Supreme Court of Illinois on April 22, 1966 (R. 101). This Court noted probable jurisdiction on October 10, 1966 (R. 106). The jurisdiction of this Court rests on 28 U.S.C. 1257 (2) and 2101 (c).

QUESTION PRESENTED

Whether it violates the Fourteenth Amendment Due Process Clause or the Commerce Clause for a State to require an out-of-State mail order house that continually and systematically solicits business in the State by means of catalogs and sales flyers, and who, pursuant to its solicitations ships substantial merchandise into the State for use and consumption by citizens in the State, to collect and remit a non-discriminatory use tax.

Statutes Involved

The Illinois Use Tax Act (Ill. Rev. Stat., (1963) Ch. 120, Section 439.1 et seq.) as applicable to this case provides in material part as follows.

Section 439.2 in critical part provides:

• • •

"Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of

business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State.

• • •

Section 439.3 in critical part provides:

• • •

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:

• • •

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

• • •

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible property in this State.

• • •

Section 439.9 in critical part provides:

• • •

> . . . each retailer required or authorized to collect the tax herein imposed shall pay to the Department (of Revenue) the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% or $5 per calendar year, whichever is greater, which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data in the Department on request.

• • •

Additional related sections of the Illinois Use Tax Act and the Illinois Sales Tax or Retailers' Occupation Tax are reprinted in Appendix A, pp. 49-52.

STATEMENT OF THE CASE

The Appellant, National Bellas Hess, Incorporated, (herein referred to as "National"), Statement is generally accepted as correct and accurate subject to the following additional observations and qualifications.

National's comment that the terms "retailer maintaining a place of business within this State," as those terms were used in the related Illinois statute, were ". . . originally given a conventional meaning . . ."[1] is argumentative and

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1. *Brief for Appellant* p. 4.

possibly misleading. The terms were given a meaning and interpreted in keeping with the express language of the statute, language which at that time did not include the specifically added and now concerned "catalog solicitation—in-state delivery" provision with which this Court is now concerned. The present interpretation of the statute as amended to include the "catalog solicitation—in-state delivery" provision is by no means unconventional, but is rather, its only possible interpretation. Thus, the statute now before this Court has been given a conventional meaning; the issue of the case relates not to the interpretation of the statute but to its constitutional propriety.

National's characterization of the "catalog solicitation—in-state delivery" provision as being an "artificial definition" raises an issue best reserved for the argument section of National's brief.

National's statement, specifically its description of the "Proceedings Below,"[2] may not clearly set forth the particular procedural background of the present action. To more accurately detail the proceedings below we submit the following additional statement information.

On January 21, 1963, the Appellee, Department of Revenue of the State of Illinois, (herein referred to either as "Illinois" or the "State"), pursuant to statute,[3] notified National of the amount that had been determined due from National to the State based upon measurable in-state use tax transactions. (R. 2) This notice was sent by registered mail to National at its North Kansas City, Missouri, address, and a copy was also sent to the Secretary of State

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2. *Brief for Appellant* p. 6.

3. Ill. Rev. Stat., (1963), Ch. 120 Section 439.1 et seq., specifically Section 439.8.

of the State of Illinois and to National's attorneys. National did not, as was its right, file a protest to the proposed assessment or request a hearing to determine the correctness of the assessment. (R. 2) These rights to protest and to request a hearing were specifically spelled out in the proposed assessment notice. Nor did National file, as it did in the present action, a special appearance. Simply stated, National totally ignored the notice of proposed assessment which was initiated to determine a final assessment.[4]

On June 26, 1963 the State, again by registered mail addressed to National at its North Kansas City, Missouri address, sent National a notice that a hearing had been conducted and that a final assessment determination had been made and entered in accordance with the prior, proposed assessment. (R. 2, 3, 5, 6 and 7) Notices of this assessment determination were also sent to the Illinois Secretary of State's Office and to National's attorneys. (R. 7-11) National did not respond to this notice.

Pursuant to Ill. Rev. Stat., (1963), Ch. 120, Section 451, National had 35 days in which it could have pursued an additional remedy directed at the final assessment determination entered against it. The statute provides for a filing in the courts of an administrative review action wherein all of the determinations and proceedings of the

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4. For this reason matters related to the accurateness of the assessment were not before the Illinois Supreme Court and are not now before this Court. National has never questioned the correctness of the assessment amount, save for its comments on p. 6 of its present brief that: "The period of the assessment thus began the day of the enactment of the critical amendment to the Use Tax Act and included sales based upon catalogs distributed prior to the amendment." (*Brief for Appellant*, p. 6)

Illinois Department of Revenue related to the final assessment determination entered against National could be subjected to judicial review. National did not avail itself of this right.

The instant action was brought October 15, 1963 as an action in debt pursuant to the provisions of the Illinois Use Tax Act. (Ill. Rev. Stat., (1963), Ch. 120 Section 439.8) (R. 1) The service provision of the Illinois Use Tax Act was complied with. (R. 11, 12-17) Once again a certified copy of process and the complaint were sent by registered mail to National at its North Kansas City, Missouri, address, as well as to the Illinois Secretary of State and National's attorneys. Only at this juncture in the proceedings did National take affirmative action in the form of its special appearance. (R. 18)

Summary of Argument

A.

The decisions of this Court treating nexus or minimum contact requirements have appropriately placed emphasis on substance over form in determining when an out-of-state vendor's in-state business activities render it liable to collect and remit a state use tax and subject itself to the jurisdiction of the state courts. The systematic and continuous nature of the business and the substantiality of the business results obtained, the proper minimum contact criteria, are fully satisfied in the instant case. Appellant in a systematic and continuous aggressive manner exploited the Illinois consumer market by sending into Illinois and soliciting by means of its catalogs and advertising flyers. This solicitation effectively resulted in the placing of substantial orders by Illinois citizens, requir-

ing appellant to cause continuous and substantial deliveries into Illinois of the merchandise ordered by the Illinois citizens. Parenthetically we might paraphrase the apropos remark of this Court in *Scripto, Inc. v. Carson,* 362 U.S. 207, 211, where it captured the gravemen of this type case by observing that the only incident which occurs outside of the state is the acceptance by the out-of-state vendor of the orders.

Through its in-state presence by means of continuous and systematic catalog solicitation and resulting deliveries Appellant has effectively realized a significant business efficiency in Illinois, a business efficiency which justifies the State in requiring Appellant to collect and remit the Illinois Use Tax. This equation of business efficiency criteria with legal minimum contact criteria is a sound and necessary rule which has been adopted by this Court. *Scripto, Inc.* v. *Carson,* 362 U.S. 207; *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335 and *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 365.

In *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 365, this Court considered circumstances identical in both factual and legal posture to those in this case with one exception. In *Nelson* v. *Sears* the out-of-state vendor did have retail stores in the taxing state of Iowa, however, these retail stores were in no way related to the out-of-state catalog sales which were the subject of the suit. In this Court's later decision in *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335, the presence of the retail stores in *Nelson* v. *Sears* were characterized as being "constitutionally irrelevant" to the decision and more importantly to the right of the state to collect its tax. *General Trading Co.* v. *Tax Comm'n,* 322, U.S. 335, p. 338. Thus,

relieved of the "constitutionally irrelevant" retail stores this case is on all fours with *Nelson* v. *Sears*.

Appellant's reliance on *Miller Bros. Co.* v. *Maryland*, 337, U.S. 340, is both legally and factually unavailing. *Miller Bros.* was not, as here, a catalog solicitation case. In *Miller Bros.*, the purchasers left the taxing state to make purchases out-of-state at the vendor's store. The vendor did not exploit the state consumer market by means of solicitation. Importantly, there was no utilization of catalogs by the vendor. There was not aggressive, but only occasional, operation by the vendor in the taxing state.

B.

Far from discriminating against interstate trade and out-of-state vendors the Illinois taxing statutes specifically and effectively preclude discrimination or multa-state taxation. To the extent a tax is paid in another state it need not be paid to Illinois. (Ill. Rev. Stat., (1963), Ch. 120, Section 439.3(c)). Thus, a discrimination could never result from collection of the Illinois use tax. Discrimination could, however, result from a failure to enforce collection of this tax if out-of-state mail order firms enjoy tax free sanctuaries in their principle state of operation. Such mail order firms could operate at an economic advantage over local merchants and those out-of-state vendors who do collect and remit the Illinois tax.

The measurable incident of a use tax is the use or consumption of property in the state. A use tax, as here, properly predicated upon use or consumption of property in the State is constitutionally sustainable without reference to incidental relationships which may attach to the property. (*General Trading Co.* v. *Tax Comm'n*,

322 U.S. 335, p. 338) Moreover, assuming an additional constitutional justification for its use tax in the circumstances of the present case, the State of Illinois has among other things made its roads and courts available to Appellant's use. It is difficult to perceive Appellant's catalogs and merchandise being delivered throughout the State without the necessary use of State roads.

Participation in self-government is not and reasonably could not be a prerequisite to imposing and collecting a state use tax. In the first place a corporation, such as Appellant, could never enjoy participation in self-government in any state. Also, such a requirement could not have been satisfied in the context of the *General Trading* case, where the out-of-state vendor operated in the State through migratory salesmen.

C.

The Illinois Use Tax which serves as the basis of the present claim is an integral part of the State's fair and nondiscriminatory tax system. Accepting the constitutional validity of the Illinois tax system, and more particularly the constitutionally sound application of that system in the circumstances of the present case, the mere possibility that Congress *may* pass legislation which could require a change in the Illinois system can and should have no affect on the present decision of this Court. This observation is especially appropriate where as here the possible legislation is intended to curb abuses not appearing or inherent in the Illinois tax system or the circumstances of the present case.

ARGUMENT.[5]

Illinois May Require Collection of Its Use Tax By An Out-Of-State Mail Order Business Which Regularly And Systematically Solicits Substantial Orders and Delivers Its Goods In Illinois

—The Issue—Amenability To Suit—

National's argument asserts a violation of the Fourteenth Amendment Due Process Clause. We agree that this is the principle issue and we further agree that this issue is necessarily inwoven with similarly related "Commerce Clause" issues. We cannot agree, however, with National's suggestion as to when—at what point of time—this issue attaches or arises. We respectfully submit that the Fourteenth Amendment Due Process Clause issue only arises and relates to the right of Illinois to require National to collect the tax and to subject National to the jurisdiction of its courts. Conversely National also directs its arguments to the right of The State to measure a tax on the transaction involved.

Admittedly the Due Process issue, wherever applied, is similar in that it concerns nexus and minimum contact requirements arising out of the due process clause. However, as candidly and most appropriately observed by National:

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5. The order of this Brief will follow the same chronological and reasonably close identifying designations as initiated by National in its Brief. However, additional sub-heading designations are used for added clarity, quicker reference and to stress the affirmative aspects of our case.

> The burden of making a defense in a foreign jurisdiction is less onerous than the other burdens of acting as an extraterritorial tax collector, and therefore raises a less serious threat to the preservation of an open national market. (*Brief of Appellant*, p. 13 F.N. 2)

The tax in issue is measured upon the use or consumption of tangible personal property within the State. It is a classical use tax. We suggest a state's right to measure a use tax against items delivered into and intended for final use of consumption in the state is no longer subject to question. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62; *General Trading Co.* v. *Tax Comm'n*, 322 U.S. 335; *Scripto, Inc.* v. *Carson*, 362 U.S. 207. In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, 363, this Court with the following language unequivocally resolved the issue National now seeks to resurrect: "The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, as far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 583; *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 177."

National's argument objecting to its role as a tax collector is also without legal foundation and contrary to the prior holdings of this Court. Suffice we respectfully cite the generally referred to decision of *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86. At pages 93 and 94 the Court stated:

> The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement.

In *Monamotor,* unlike here, the tax collector did reside in the state. However, in *General Trading* and *Scripto,* where, as here, the tax collector was not within the state, the Court merely cited *Monamotor* as controlling reiterating briefly but emphatically: "To make the distributor the tax collector for the State is a familiar and sanctioned device" (*General Trading* v. *Tax Comm'n,* 327 U.S. 335, 338). And in *Scripto* the Court again observed: "Nor do we believe that Florida's requirement that appellant be its tax collector on such orders from its residents changes the situation. As was pointed out in *General Trading Co.,* this is "a familiar and sanctioned device." (*Scripto, Inc.* v. *Carson,* 362 U.S. 207, 212.)

The due process issue attaches to the State requiring National to collect and remit the tax and to rendering National amenable to process and suit but does not and cannot be related to the propriety of the Illinois use tax.

—NEXUS CRITERIA—

In initially casting his paramount argument National states: "In our view, the relevant test of nexus is whether the out-of-State concern has property or representatives carrying on its business within the taxing State." (*Brief of Appellant* p. 12.) We respectfully suggest that this is not an accurate statement but a faulty over generalization of the nexus criteria and further, even assuming *arguendo,* this to be the criteria it is satisfied by National's in-state business activities.

Admittedly the in-state presence of property or representatives may well satisfy or cumulatively aid in satisfying the nexus requirement. However, property or representatives are not the *sine qua non* of the criteria. This Court has never expressed the nexus criteria in such gen-

eral, artificial and limited terms, a fact apparent by the conspicuous absence of case support for this statement by National. For that matter, this Court has taken pains to indicate the nexus criteria ". . . cannot be simply mechanical or quantitative." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319.

The emphasis of this Court in deciding nexus or minimum contact criteria cases has been directed towards the systematic as opposed to the occasional, towards the continuous as distinct from the casual, towards the substantial as opposed to the insignificant, and finally, towards the substance as distinct from the form of the nature of the activities being considered. In deciding the instant case the Illinois Supreme Court applied these criteria. The facts before the Court, facts upon which the Illinois Court justified making National amenable to this proceeding, are briefly reviewed as follows:

1. National's systematic and continuous, as distinct from irregular or casual, distribution throughout the State of its catalogues and other advertising material.

2. National's systematic and continuous, as distinct from irregular or casual, solicitation within the state by means of the above-mentioned catalogues and advertising material.

3. The systematic and continuous, as distinct from irregular or casual, placing of orders for merchandise through and with the aid of National's catalogues in this State by Illinois residents.[6]

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6. By way of illustrating the magniture of National's in-state business and its in-state systematic and continuous operations, covering the period from July 17, 1961 through October 31, 1962, defendants should have collected Illinois taxes amounting to $74,593.75. This tax amount would be measured against sales of $2,174,744.86.

4. National's systematic and continuous, as distinct from irregular or casual, causing to be delivered within this State to Illinois residents for final use or consumption the merchandise sold by National.

5. National's systematic and continuous collection in Illinois from State residents by defendant's common carriers, independent contractors or agents of the purchase price of the merchandise sold.[7]

Parenthetically, it might well be observed that as in *Scripto:* "The only incident of this sales transaction that is nonlocal is the acceptance of the order." (*Scripto, Inc.* v. *Carson,* 362 U.S. 207, 211.)

Clearly National engaged in regular, systematic and substantial Illinois directed and oriented business activities. These activities, substantial in their nature and substantial in their business success and result, gave rise to the liability sued upon and satisfy the minimum contacts requirement of the Due Process Clause. On the basis of these activities, we respectfully suggest, it was not offensive ". . . to our traditional conception of fair play and substantial justice . . ." to require National to collect and remit the Illinois tax and respond to the instant suit which related to and emanated from these same activities. *International Shoe Co.* v. *Washington,* 326 U.S. 310, 320.

Actually the facts of this case can satisfactorily comply with the limited nexus criteria test which National suggests. National's catalogs and advertising flyers, admittedly personal and not real property, if that formal dis-

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7. Admittedly C.O.D. type collection was not the practice in all cases.

tinction is of significance,[8] are found within the State, as are its "representatives" and their delivery trucks who and which made deliveries of and collections for National's merchandise. Again resorting to form over substance these "representatives" are not employees, however, as common carriers does National now argue that they are legally distinct from the "independent contractors" in *Scripto*?[9] The test set forth in *Scripto* is resolved favorable to Illinois in that the use of catalogues and common carriers does not ". . . result in changing (its) local function of solicitation nor bear upon its effectiveness in securing a substantial flow of good into . . ." Illinois. *Scripto Inc.* v. *Carson,* 362 U.S. 207, 211.

—ABILITY TO COLLECT THE TAX—

A final observation is required. In its initial sentence National states what it believes Illinois is seeking to do by the present suit. Its final clause,—i. e. ". . . when they cannot collect it" requires comment. (*Brief for Appellant*

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8. See *Americal Oil* v. *Neill,* 380 U.S. 451, 455 as being the most recent in a long and unaltering line of expressions by the Supreme Court to the effect that in judicial analysis of state tax cases emphasis should be placed on substance and not form.

9. In support of its nexus argument National cites and relies upon *State of Alabama* v. *Lane Bryant Inc.,* 277 Ala. 385, 171 So. 2d 91, which National states was decided upon "indistinguishable facts". (*Brief For Appellant* p. 12) This statement is not accurate. In *Lane Bryant* there were no in-State deliveries by truck or common carrier—only the mail was used.

p. 11) If unintentionally related to National in the context of the present case the implication that it could not or did not collect the Illinois use tax is faulty and not in keeping with the factual record of the case. There has never been evidence introduced or suggested or argument made that National could not, indeed did not, collect the tax in question. Any suggestion to the contrary is necessarily unsupported by the record and the facts of the case.

A. A State May Require Collection of Its Use Tax By an Out-Of-State Seller Who Continually and Systematically Distributes Advertising Material Which Results In the Substantial Shipment of Goods Into the State

The above stated issue is one which has not been directly presented to or resolved by this Court. (See *House Report* No. 565, 89th Congress, 1st Session, *Report of the Special Subcommittee on State Taxation of Interstate Commerce,* p. 627. This work is hereinafter cited and referred to as the *"Report"*.) This Court has, however, from time to time passed on cases which in varying degrees might be analogized in part with the factual circumstances and more strongly and importantly the legal issues raised herein. National in its brief has cited most of these cases and in certain aspects sought reliance upon them. We now consider, as National has already considered, these related cases, cases which we suggest express judicial approbation for the imposition and collection by Illinois of its use tax under the circumstances of the present case.

We think it fair to state that National's principle reliance is placed upon *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, *Nelson* v. *Sears Roebuck & Co.,* 312 U.S. 359 and *American Oil Co.* v. *Neill,* 380 U.S. 451. It would reasonably appear that National's reliance follows the same order in which we have listed these cases.

—Miller Bros. Co. v. Maryland, 347 U.S. 340[10]—

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10. *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, is primarily discussed at sub-section (e) of National's Brief for Appellant, pp. 18, 19 and 20.

National's reliance on *Miller Bros.* is easily understood and appreciated. *Miller Bros.* is the only recent case[11] wherein this Court denied the state the right to collect its tax.

In *Miller Bros.* the seller and the sale were out of the taxing state of Maryland in Delaware. The customers were from the taxing state, Maryland. The tax was a use tax and Maryland sought to make the seller its collector of the tax. In these aspects, and only in these aspects, were the facts of *Miller* similar to those now before the Court.

We must respectfully take issue with National's representation of the facts in *Miller* as involving ". . . regular deliveries in Maryland . . .". (*Brief For Appellant,* pp. 18 and 19) The Court conversely characterized these same deliveries as being "occasional". *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 347. So also Justice Clark writing for the majority in *Scripto* again referred to the "occasional" deliveries in *Miller. Scripto Inc.* v. *Carson,* 362 U,S. 207, 212.

Turning to major fact dissimilarities between the two cases we submit the following. In *Miller Bros.* the Maryland residents left the state and personally made the purchases in Delaware. The Delaware seller only sold directly to customers personally present in its Delaware store, a distinction which gains particular importance with the realization that in some cases the seller did not and could not have necessarily known the state citizenship of his

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11. *American Oil Co.* v. *Neill* also rules against the State in its attempt to impose its tax. However, for reasons detailed in our subsequent consideration of *American Oil Co.* we believe it to be so distinguishable from the facts and law of this case as to be totally without significance.

customer or more importantly the eventual destination of the merchandise.[12]

In some instances merchandise was carried away by the purchaser from the Delaware store. The Delaware seller made no C.O.D. deliveries and thus necessarily made no in-state collections for its merchandise. Also, the seller did not solicit mail orders in Maryland by means of catalogs. The sellers only in-state advertising arose from and was incidental to his placing ads in Delaware papers and advertising on Delaware radio stations. In addition occasional circulars were sent to all former customers which necessarily included some Maryland citizens. The seller's total sales covering a period of 4½ years from July 1, 1947 to December 31, 1953 were only $12,000.00. Parenthetically, we might contrast this figure with National's sales to Illinois citizens. Covering a period of some 14 months from July 17, 1961 to October 31, 1962 National's sales to Illinois residents were $2,174,744.86.[13]

Upon these facts, facts quite distinguished from those now present, the Court in deciding *Miller Bros.* observed that there was ". . . a wide gulf between this type of active and *aggressive operation* within a taxing state and the *occasional delivery of goods* sold at an out-of-state store

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12. The Court emphasized this point by stressing the nature of a use tax and indicating: ". . . liability arises only upon importation of the merchandise to the taxing state, an event which the vendor may have no control or even knowledge, at least as to merchandise carried away by the buyer." (*Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344.)

13. This figure is computed on the basis of National's $74,593.75 final assessment, having taken into consideration the Illinois statutory 2% administration expense rebate.

with *no solicitation* other than the incidental effects of general advertising. Here was *no invasion or exploitation of the consumer market* in Maryland" (Emphasis added) *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 347.

In referring to and distinguishing *General Trade Co.* v. *State Tax Comm'n,* 322 U.S. 335, the Court in *Miller Bros.* observed as follows:

> That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct *continuous local solicitation* followed by *delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order.* Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as *equivalent to being a local merchant.* (Emphasis added) *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 346.

The above underscored distinguishing features, continuous local solicitation, delivery of ordered goods to the consumer, and the fact that the only nonlocal phase of the sale was its acceptance, are all present in this case as they were in *General Trading Co.* It should further be observed that in distinguishing *General Trading Co.,* no emphasis, no less mention, was made of the traveling salesmen in *General Trading,* traveling salesmen who were not present in *Miller* and are not present here.

If the *Miller decision* itself is not clear in its holding and implications, any uncertainties which it may have caused have been emphatically resolved by the later *Scripto* decision. *Scripto Inc.* v. *Carson,* 362 U.S. 207. In writing *Scripto* Justice Clark unambiguously distinguished *Miller* and in so doing emphasized it was not a catalog

solicitation case such as we have here. In addition to observing, as National has already pointed out, that the seller in *Miller Bros.* ". . . had no solicitors in Maryland . . .", Justice Clark continued by stating that in *Miller*:

> There was no "exploitation of the consumer market"; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. True, there was an "occasional" delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases —Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland, *Scripto Inc.* v. *Carson,* 362 U.S. 207, 212.

Using these adumbrated criteria we contrast and in so doing distinguish *Miller Bros.* from this case by suggesting the following facts, all of which are present here, none of which were present in *Miller Bros.*

1. An "exploitation" by National of the State consumer market.
2. National's "regular, systematic displaying of its product by catalogs, samples or the like."
3. Sales were not made to individuals "personally present" at National's store or factory.
4. There were continual systematic and substantial deliveries into Illinois of National's merchandise.
5. There were regular and continuous sales flyers mailed to Illinois citizens in Illinois.

6. National could easily determine that the goods it sold and shipped to Illinois citizens were to be used eventually in the State.

In *Miller* the Court concluded there were not sufficient "minimum contacts" to constitutionally justify the tax imposition. Accepting *Scripto's* points of distinction they then become, *inter alia*, sufficient to justify the nexus and "minimum contacts" requirement. As observed, all are affirmatively present in this case.

—Nelson v. Sears Roebuck & Co., 312 U.S. 359—[14]

In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, the facts were similar if not identical to the facts of this case with one exception. In *Nelson* v. *Sears* the out-of-state catalog seller, Sears, maintained retail stores in Iowa, the taxing state. These in-state stores in no way related to the mail orders which gave rise to the suit. The Court stated ". . . the nub of the present controversy centers on the use of respondent as the collection agency for Iowa." (*Nelson* v. *Sears*, 312 U.S. 359, p. 364) The controversy, involving similar Due Process and Commerce Clause issues, was resolved in favor of the State of Iowa. On the basis of this ruling alone it is somewhat difficult to appreciate National's prime reliance on this decision.

Any argument National would make on the basis of *Nelson* v. *Sears* must necessarily be premised upon a contention that the in-state presence of the unrelated retail stores was the *sine que non* of the decision. Such a premise is not supported by the language of the decision. Understandably the presence of the retail stores elim-

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14. *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, is primarily discussed at sub-section (b) of National's *Brief For Appellant*, p. 16.

inated the service of process issue and undoubtedly was a factor properly considered in determining minimum contracts. However, nowhere does the Court singularly distinguish or stress the overriding importance of the retail stores or indicate that their presence was essential to its decision.

On the contrary, this premise suggesting the presence of the in-state retail stores as a *sine que non* of *Nelson* v. *Sears* is directly and specifically rebuked in the context of the Court's later and we suggest dispositive opinion in *General Trading* v. *Tax Comm'n*, 322 U.S. 335. In unequivocally holding that the incidental in-state presence of the retail stores were not necessary to the decision reached in *Nelson* the Court concluded:

> And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance." (*General Trading* v. *Tax Comm'n*, 322 U.S. 335, 338)

In sum, rather than supporting National's arguments, *Nelson* when read along with the more recent *General Trading* case is totally dispositive of the instant issue adverse to National's contentions. Absent the in-state retail stores, a fact without legal significance according to the holding in *General Trading*, *Nelson* is on all fours with this case and gives support to the Illinois tax claim.

—Nelson v. Montgomery Ward & Co., Inc., 312 U.S. 373[15]

Nelson v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373, was a companion case to *Nelson* v. *Sears*. The issues were identical and the disposition was the same. Interestingly however, is an observation made by Justice Douglas in writing the majority opinion. It is observed that Montgomery Ward, unlike Sears, advertised its catalog sales capacity in the taxing state of Iowa. The fact of these advertisements prompted Justice Douglas to observe:

> This stipulation clearly means that respondent has solicited mail order sales in Iowa. The fact that that solicitation was done through local advertisements rather than directly by local agents as in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. (*Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373, 376.)

By this quote it would appear this Court as early as its 1940 decision in *Nelson* v. *Montgomery Ward* had indicated a disposition of the present issue by equating local solicitation with the presence of local agents. This rationale is easily and well understood in a reading of the Court's later decisions in *General Trading Co.* v. *Tax Comm'n.*, 322 U.S. 335 and *Scripto, Inc.* v. *Carson*, 362 U.S. 207.

We appreciate National's argument directed at the above quoted language of the Court (*Brief For Appellant* pp. 16 and 17) wherein National suggests that the

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15. *Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373, is primarily discussed at sub-section (c) of National's *Brief For Appellant*, pp. 16 and 17.

use of the term "local" qualifies the above statement to mean only local advertising placed in-State by local employees. Obviously the advertising was local. However, we cannot agree with this qualification, a qualification which accurately would not have required a contrasting reference to *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, where there definitely were local agents within the State.

Even assuming the correctness of the qualification National now asserts it still remains that advertising within the State was of sufficient importance to draw judicial comment and at the veary least was part of the in-State nexus.

—American Oil Co. v. Neill, 380 U.S. 451—[16]

Reliance on *American Oil Co.* v. *Neill*, 380 U.S. 451 is factually no less legally misplaced. The tax involved therein was an occupation tax or more properly a sales tax and not as here a use tax. Quoting the trial judge's finding the Court acknowledged ". . . the taxable event or transaction is not the use by the local consumer of purchasers, but the 'receipt' of the gas by the dealer". (*American Oil Co.* v. *Neill*, 380 U.S. 451, 456.)

As to the importance of this distinction attention is respectfully called to *McLeod* v. *Dilworth Co.*, 322 U.S. 327 and to *General Trading Co.* v. *Tax Comm'n*, 322 U.S. 335. Both cases were decided on the same day and both involve almost identical fact circumstances with one major distinction. *Dilworth* concerned a sales tax and *General Trading* involved a use tax. This distinction

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16. *American Oil Co.* v. *Neill*, 380 U.S. 451, is primarily discussed at p. 12 of National's *Brief For Appellant.*

was the *sine qua non* of the decisions, the Court upholding the tax in *General Trading* and conversely finding the tax constitutionally invalid in *Dilworth*.

By way of further distinction, *American Oil* was not a catalog mail order case—a fact apparent in that American Oil did have a place of business in the taxing state of Idaho. Further, the invitations to bid extended by the federal government, the bidding by American Oil, the government's accepting of the bids, the place from which the goods originated, passage of title and delivery of the goods to the government—all occurred outside the State of Idaho. Idaho's argument, rejected by the Court, was predicated upon the government, not American Oil, later bringing the oil into the State of Idaho. Appropriate to this case the Court in deciding observed ". . . no in-state activities connected with out-of-state sales". (*American Oil* v. *Neill* p. 458). It is difficult to analogize *American Oil* with any of the issues argued by National.

—General Trading Co. v. Tax Comm'n, 322 U.S. 335—[17]

Scripto, Inc. v. Carson, 362 U.S. 207—[18]

General Trading Co. v. *Tax Comm'n*, 322 U.S. 335; *Scripto, Inc.* v. *Carson*, 362 U.S. 207 and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 are the other cases given designated sub-section treatment in National's

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17. *General Trading Co.* v. *Tax Comm'n*, 327, U.S. 335, 338, is primarily discussed at sub-section (d) of National's Brief For Appellant, pp. 17 and 18.

18. *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 212, is primarily discussed at sub-section (f) of National's Brief For Appellant, pp. 20 and 21.

Brief.[19] All involve use tax collections from out-of-state sellers. In all three cases this Court approved the collection of the tax by the state.

Gallagher was the first case in which this Court required an out-of-state merchant to collect a use tax on ordinary retail sales. The in-state nexus consisted of two leased offices and two general agents who were in turn empowered to employ sub-agents and distributors. Its significance to the present issue is, we suggest, for the most part historical. National apparently cites this case as leaving unresolved the issue as to whether an out-of-state seller can be rendered a collector of a use tax. Admittedly this issue was not decided in *Gallagher*, for that matter it was not presented in *Gallagher*. This issue has, however, been resolved in many cases subsequent to *Gallagher*. *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86, 93 and 94; *General Trading Co.* v. *Tax Comm'n*, 327 U.S. 335, 338; *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 212.

General Trading and *Scripto* were decided upon factual circumstances and in the context of legal issues closely approximating these now before the Court.[20] By way of distinguishing *General Trading* from this case, in *General Trading* the out-of-state seller sent migratory or traveling

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19. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is primarily discussed at sub-section (a) of National's Brief For Appellant, pp. 15 and 16.

20. In *Scripto* the Court, by footnote, set forth the pertinent provisions of the Florida statute. (*Scripto Inc.* v. *Carson*, 362 U.S. 207, 207, 208). With some insignificant emendation in certain language the Florida statute of *Scripto* and the Illinois statute now before the Court are identical.

salesmen into the taxing state to obtain its orders. National used its catalogs and mail flyers in lieu of the traveling salesmen. In *Scripto* the orders were solicited in the taxing state with the aid of 10 independent contractor brokers. These brokers utilized catalogs in advertising material. However, catalogs or advertising material were not distributed to or made available to the public as a whole. In sum, National's purpose was successfully and subsequently effected by the use of catalog solicitation. Conversely, in *General Trading* and *Scripto* individuals and not catalogs satisfied the business purpose.

No sales tax figures are mentioned in *General Trading*. In *Scripto,* covering a period of 4 years the out-of-state sellers sales totaled. $171,688.66. This figure is derived from computing the 3% Florida tax against the $5,150.66 assessment. The actual assessment against National without including the penalty was $74,593.75. This figure, having applied the 2% Illinois administration expense rebate,[21] would measure sales totalling $2,174,744.86 covering a period of approximately 14 months from July 17, 1961 to October 31, 1962. On the basis of the figures in *Scripto,* figures substantially less than those attributable to National, the Court concluded, *Scripto* had caused a ". . . substantial flow of goods into Florida". *Scripto, Inc.* v. *Carson,* 362 U.S. 207, 211. We think it fair to conclude upon this authority that National likewise has caused a substantial flow of goods into Illinois.

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21. Ill. Rev. Stat., (1963), Ch. 120, Section 439.9 provides in relevant part as follows, a retailor in remitting taxes collected shall do so ". . . less a discount of 2% or $5 per calendar year, whichever is greater, which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request."

National of obvious necessity has placed undue emphasis on the only factual distinction between *General Trading, Scripto* and this case—i.e. that there unlike here there were individuals in the form of migratory salesmen or independent contractors operating from time to time within the State.[22] We suggest that this distinction is unavailing, not only for the reasons heretofore stated, but also, because such an argument would fail to recognize the possibility that systematic and continuous solicitation, regardless of its form and notwithstanding the in-state absence of individuals whatever their legal relationship might be, is sufficient to justify the constitutional nexus requirement.

In this regard it is significant to note that in *Scripto* the company had no property or agents in the state. The fact that there were ten independent contractors in the state soliciting orders for its goods was held to be a sufficient nexus to require the company to collect the State's use tax. In an earlier stage in the development of the law it was thought that property or agents in the state were required before a corporation could be said to be "doing business" in a state and subject to its regulation. National attempts to retain this law giving as little effect to the decision in *Scripto* as possible by stating that now there must be property or a "representative" in the state. This distinction between *Scripto* and the instant case is patently invalid. In *Scripto* the corporation was not present in the state through its property or agents. The fact that independent contractors engaged in regular

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22. National does not call attention to the fact that here unlike *General Trading* and *Scripto*, National continuously and systematically distributed its catalogs and other advertising material within the State.

solicitation of its market was the key to the decision. There is no valid basis to distinguish between solicitation by catalog or by independent contractor because in both cases no agent or property of the compeny is present in the state.

Justice Rutledge in a concurring opinion in *Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 and *General Trading* v. *State Tax Commissioner of Iowa*, 322, U.S. 355, and in a simultaneous dissenting opinion in *McLeod* v. *J. E. Dilworth Co.*, 332 U.S. 327[23] applied a proper and particularly appropos emphasis to those decisions, especially *General Trading*. Justice Rutledge indicated a continuous course of solicitation regardless of the means employed would satisfy constitutional requirements. Relative to the Court's continuous course of solicitation finding he observed.

> The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines this process in terms as 'a retailer maintaining a place of business in this state.' The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax.
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> Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, *regular, continuous, persistent solicitation has the same*

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23. For purposes of this discussion *McLeod* involved factual circumstances identical to those in *General Trading*, however, in *McLeod*, Arkansas sought to measure a sales as distinct from the use tax employed by Iowa in *General Trading*. The *McLeod* decision turned on the basis of this distinction.

economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. (Emphasis added) (*Harvester Co.* v. *Department of Treasury,* 322 U.S. 340, 354)

—In Personem Jurisdiction Cases—

Although not catalog mail order cases in the true sense of terminology, *Travelers Health Assn.* v. *Virginia,* 339 U.S. 643, and *McGee* v. *International Life Insurance Co.,* 355 U.S. 220, are legally applicable to this case and give support to the State's present contentions. As heretofore observed the gravemen of the issue before this Court concerns the right of the State to make an out-of-state defendant amenable to its courts. *Travelers Health Assn.* and *McGee* involve the identical issue.

Both were insurance related cases wherein the out-of-state insurance company activities within the state seeking to effect them through legal process were far less than those attributable to National. In *Travelers Health Assn.* mail order health insurance policies were solicited by mail and delivered in the State of Virginia. Upon these relatively limited facts the Court at p. 648 disposed of a similar Due Process argument by citing, quoting and relying upon *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316. Particularly adverse to National's attempt to define the nexus criteria in terms of form rather than substance is the language expressed by Justice Black in writing the majority opinion: "Metaphysical concepts of . . . 'presence' in a state should not be solidified into a constitutional barrier . . .". (*Travelers Health Assn.* v. *Virginia,* 339 U.S. 643, 649)

In *McGee* a single insurance policy was delivered by mail into the State. The Court justified the State's serving

the insurance company with process by registered mail and thereby assuming jurisdiction over it on the rationale that the facts created minimum contacts and ties with the residents of the State. Surely a similar rationale is appropriate here where the contacts and ties with Illinois residents are indeed more substantial as well as more systematic and continuing.

— Case Conclusion —

General Trading and *Scripto* as well as the above discussed insurance related cases were not decided upon any artificial, formal or metaphysical presence rationale. Rather, the thought to be distilled from these decisions, indeed and thoughts to be distilled from a review of all of this Court's related minimum contact decisions, is that nexus is sufficient constitutionally where in the business sense it is sufficient practically; where it effectuates a business purpose within the state, notwithstanding as here, there being "apparently simpler needs for soliciting business",[24] so long as changes or reductions in local functions do not bear ".. ..upon its effectiveness in securing a substantial flow . . ." of business in the state. Here the business purpose is satisfied—as is the nexus requirement—by the sytematic and continuous supplying and promulgating of catalogs and other advertising material into the state and the accompanying subsequent collection for and delivery within the state of merchandise purchased. These multifarious business activities are inextricably intertwined and ineluctably tied to the State of Illinois. This reasoning bears profound analysis when

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24. *General Trading* v. *Tax Comm'n*, 322 U.S. 335, 338. U.S. 335, 338.

measured against present demands of state financing, and is, we suggest, the legal polestar upon which courts should be guided in deciding similar issues.

In most appropriate language *McGee* v. *International Life Insurance Co.*, sets forth the theory and rationale upon which, we respectfully submit, this case should be decided.

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity. (*McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 222-223.)

The decisions of this Court best illustrates that states in effecting their tax law programs in dealings with out-of-state merchants do so in an atmosphere long removed of antiquated legal bromides and formal concepts which were intended to serve a time and a place with physical remoteness and detached isolationism were the political and business order of the day. This Court has well appreciated technicological improvements and ever increasing business sophistication. The vicissitudes of economic life have accordingly spawned necessary judicial concepts to meet these changes and advanced times.

B. To Permit A State To Require Out-Of-State Sellers Who Engage In Substantial In-State Business Sales And Deliveries To Collect Local Use Tax, To The Extent The Seller Has Not Paid A Corresponding Sales Tax On The Same Transaction, Is Both Legally And Economically Sound And Necessary To Preserve Local Merchants And State Government

The State of Illinois is in no way intending to or in fact obstructing the sale to Illinois residents and delivery into our State of ". . . Vermont maple sugars, New Orleans pralines, and the beautiful Sierra Club publications . . ." or any similar local specialties. (*Brief For Appellant* p. 21) On the contrary we respectfully submit that Illinois through the statutory tax plan now before the Court affords out-of-state sellers of these commodities or any other product the fairest of considerations. Parenthetically we might question whether combined total sales of these particular items to Illinois residents would even come close to approximating National's sales.

We cannot help but wonder if the ". . . onerous discriminatory and extraterritorial burdens . . ." imposed by Illinois in the context of the present case would be relieved or substantially lessened had National been fortunate, or unfortunate as the case may be, to have had a few migratory salesmen or 10 independent contractors from time to time present in Illinois in lieu of its catalogs and sales flyers? (*Brief for Appellant* p. 22)

1. Compliance With The Illinois Use Tax Could In No Way Discriminate Against Or Impose Cumulative Burdens Upon Out-Of-State Mail Order Businesses

Ill. Rev. Stat., Ch. 120, Section 439.3(c), specifically expressing a desire to prevent multistate taxation, provides the State use tax shall not apply to:

> The use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state. (Ill. Rev. Stat., (1963), Ch. 120, Section 439.3 (c))

In accordance with the statute set out above, where as in the circumstances of this case, the destination of merchandise sold in an interstate transaction is Illinois, the State imposes its use tax only to the extent a corresponding sales or use tax was not imposed by the state of origin. To the extent a tax has already been paid in the state of origin the above Illinois statute specifically creates a corresponding exemption to the extent of the tax already paid.

In providing as Illinois has for an off-set credit it is, admittedly, in a minority. The tenor of National's discrimination arguments might best be directed towards that minority, assuming *arguendo,* the arguments relation to constitutional issues. As observed in the Report: "Just short of half the States allow no credit for overpayment on the theory that the State where the property is finally used should be the State to get the tax."[25] The Report further indicates Illinois is one of 14 States providing such a credit exemption for taxes paid to other States. (Report p. 826—Chart)

We submit that by virtue of the above statute Illinois specifically and effectively provides against interstate transactions having to bear a greater burden than local sales transactions. There can be no multiple imposition

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25. *Report,* p. 825, citing as follows: "See Dues, State Sales Tax Administration, p. 204 (1963)."

of the Illinois use tax. An out-of-state seller such as National is liable only for the difference between taxes measured in the original state (3% in Missouri) and the Illinois use tax, if a tax was measured in the original state.

Apropos National's allegation of discrimination we think it appropriate to refer to the Report and in so doing suggest that ". . . the states have made very little attempt to tax sales of goods shipped to the buyer in another state." (*Report,* p. 613) As indicated in the Report the fear of protests by their own businessmen that they would be placed at a competitive disadvantage has resulted in most states not taxing outshipments such as involved in the normal mail order transaction. The result of this practice renders transparent National's present concern with collecting the Illinois use tax. (A tax which assuming National to have paid its Missouri sales tax, would only amount to ½ of 1%.) Mail order catalog sellers in attempting to avoid remitting a use tax such as imposed here do so to effect a grossly iniquitious and total tax free transaction.

The result and predatory effect on local merchants of such a tax avoidance scheme is apparent. Local merchants who necessarily must collect the Illinois tax are forced to compete with out-of-state mail order sellers who can totally avoid taxation. Assuming, as suggested by National in the context of a different argument, that the ". . . margin of profit before taxes were 4% of sales . . .", and applying thereto the Illinois 3½% tax, our local merchants' gross profit would be dissipated to ½ of 1%. We respectfully suggest that what National, in the context of this case, and other mail order firms are attempting to do, is not eliminate a discrimination—allegedly directed at

them—but perpetrate a present discrimination against local sellers.

—The Report—

Throughout its brief National continually and quite dependently refers to the House Special Sub-Committee Report On State Taxation Of Interstate Commerce and possible statutory enactments which may result from the committee hearings. (89th Congress, 2nd Session, H.R. 16491) We believe National has both unduly and erroneously relied upon the Report. Admittedly legislation[26] creating the committee which prepared the Report was initially instigated by legislators and businessmen who took particular affront at the results of this Court's decision in *Northwestern Portland Cement Co.* v. *Minnesota,* 358 U.S. 450. Understandably the concern of mail order firms was not prompted by entirely altruistic motives.

Scripto, Inc. v. *Carson,* 362 U.S. 207, gave further emphasis to those who would legislatively set aside the decisions of this Court. *Scripto* resulted in expanding the study to include state sales and use taxes.[27] It is this expanded study which relates to the circumstances and issues of this case.

We feel that the Report itself is eminently fair and does an excellent job of probing the many problems related to the imposition and collection of state sales and use taxes. We respectfully suggest, however, that the emphasis of the Report, the abuses which it observed and suggested should be corrected, in no way concerned or concern the particular circumstances of this case.

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26. Public Law 86-272, 73 Stat. 555 (1959).

27. Public Law 87-17, 75 Stat. 41 (1961).

The main trust of the Report primarily addresses itself to abuses resulting from the many variations in taxes and collection criteria in the various states. In addition to criticizing this lack of unanimity among the states secondary objection is found in the failure of states to provide an off-set credit provision to eliminate prossible multiple taxation. As observed in the Report and noted in this brief Illinois was and is among the 14 states who have provided such a salutary provision.

Also subject to criticism was the practice of not providing some reimbursement to sellers to help defray the cost of administering tax collections. Again, Illinois finds itself in the forefront having provided a 2% discount to retailers. (Ill. Rev. Stat., Ch. 120, Section 439.9)

H.R. 16491 to which National alludes, would, if passed, proscribe the State of Illinois from the further collection of its use tax under the circumstances of this case. Interestingly, the bill would also render for naught this Court's decision in *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335 and *Scripto, Inc.* v. *Carson,* 362 U.S. 207. Similarly Iowa and Florida would be proscribed from future collections of its tax under the circumstances of the *General Trading* and *Scripto* decisions. (See H.R. 16491, Section 513(d)).

It is difficult to understand how this tentative bill can in any way affect the constitutional issues which National raises in the instant case. Certainly the passage of this bill, if it is to pass, could in no way affect the constitutional principles decided in *Scripto* and *General Trading.* So also, it should not, especially in its present posture, affect this Court's decision in this case.

2. To Constitutionally Measure A Use Tax All That Is Required Is The Use Or Consumption Of The Property Within The State

National argues it is not afforded any benefits or privileges by the State of Illinois. To put it bluntly this statement is legally specious and not true. In the first place the incident of the tax is the use or the enjoyment of property within the State, not as National's argument would suggest, its activities. As noted in *General Trading Co.* v. *Comm'n,* 322 U.S. 327, 338: "The mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share." The privilege there as here was the enjoyment of the property within the state.

Moreover, even when we address ourselves to the privileges made available to National by this State, as already mentioned in the preceding paragraphs, National's common carriers, delivering agents and bill collectors continually and systematically use among other less obvious things our roads. More importantly, our various state agencies, most obviously our court system, are available to National. In this regard National's allegation that it has not sought to exercise these rights is without merit. For determination is whether these rights or services are available to National, not, as implicit in National's argument, whether it has availed itself of their use.

3. Participation In Self-Government In No Way Relates Or Conditions The Imposition Or Collection Of A Use Tax

It is somewhat difficult to follow to a natural conclusion National's argument that its participation in self-govern-

ment is a prerequisite to Illinois imposing and collecting a use tax on items used or consumed in the State. This argument is particularly shallow when made, as here, by a corporation who necessarily cannot participate in self-government in any state. If such an argument were made it was obviously rejected in *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335, where from its facts it would appear somewhat obvious that the migratory salesmen did not enjoy participation in Iowa self-government.

Not only is this argument faulty but the conclusion it attempts to suggest belies the circumstances in this case. The Illinois taxing plan, far from expressing a feeling of non-concern for out-of-state businesses, has, as already pointed out, specifically provided for such out-of-state businesses. The facts before the Court do not manifest an abuse of the democratic process to the detriment of National, no less other out-of-state businesses.

4. Local Merchants Do Suffer Competitive Disadvantage Where Required To Compete With Out-Of-State Mail Order Firms Who Are Not Required To Collect And Remit Taxes

National again finds itself relying upon, or better stated, suggesting a fact not in the record of this case; that it has paid a tax in Missouri on the related transactions. The facts anent this record disclose no such payments to Missouri. Moreover, if payments had been made they would necessarily serve to exempt National to the extent of such payments. (Ill. Rev. Stat. Ch. 120, Section 439.3(c)) Also, the Report indicates that such taxes are not usually imposed on mail order store transactions where as here the merchandise is shipped out-of-state. (*Report,* pp. 613, 776, 777 and 824)

Even assuming, *arguendo*, that National had paid a tax in Missouri and that as a result local competing merchants would not suffer a "competitive disadvantage", this would in no way effect the economic propriety no less the constitutional validity of the Illinois use tax.

Conversely, if National did not pay a Missouri tax and were not required to collect and remit the Illinois use tax a definite "competitive disadvantage" would attach as to its Illinois competitors. National cavalierly suggests this ". . . competitive disadvantage is greatly exaggerated." (*Brief For Appellant*, p. 37) "Competitive disadvantage" is not the subject of speculation, but rather, can be objectively measured with reference to the Illinois tax of 3½%. Again applying National's earlier suggestion that 4% would be a "pretty good" profit margin for such a business, we can easily compute and realize the impact, far from exaggerated, which would result in reducing a profit margin from 4% to ½ of 1%. (*Brief For Appellant*, p. 28)

Baldwin v. *G.A.F. Seelig Inc.*, 294 U.S. 511, is inopposite any issue now before the Court. *Baldwin* concerned an attempt by the State of New York to neutralize economic advantages belonging to the state of origin of milk. Purposely to obstruct and create an economic barrier directed towards the importation of milk New York by statute required that milk sold within the State have originally been sold by producers to dealers at prescribed minimum prices. It is one thing for a state to attempt an equalization of economic advantage. It is a very different thing for a state to apply its tax plan equally to all retailers.

A few extended quotations from the Report are necessary to qualify and place in proper perspective National's quotation from the Report appearing at page 38 of its

brief. The quote National sets forth suggests there is no competitive reason to require *specialized mail order* operators to collect taxes. It further suggests the possibility of problems in collecting such taxes. Not only is this quote unrelated to the constitutional arguments now before the Court, but it is also misleading.

National is not, within the terminology of the Report, a *specialied mail order* operator. In referring to specialized mail order operators the Report has reference to those offering only ". . . one or a very few items through brief magazine advertisements or direct mail solicitation." (*Report,* p. 770). Such specialized mail order operators comprised ". . . a great many small firms selling by magazine advertising, direct mail solicitation and the like . . ." (*Report,* p. 777).

On the other hand National would best fit the description of a mail order house which uses ". . . thick catalogs to conduct by mail what amounts to nationwide department stores." (Report, p. 770) National ". . . catalogs present a wide variety of merchandise . . . approximately 4000 different items . . .". (R. 32, 69) Appropriate to this distinction the Report observes:

> The collection problem is considerably mitigated where goods are offered in a catalog operation rather than in spot advertisements. Space is available to explain the sales tax in different States. In addition, the average order tends to be larger, making it more feasible to attempt to collect unremitted sales tax. Furthermore, most of the major catalog houses offer credit schemes of one form or another and sales tax from credit customers need merely be added to the amount due. Even on cash sales, purchases from a catalog often require the customer to make additions to the price for postage or freight that involve computations more complex than sales tax. This means that, on the one hand, customer reluctance to compute tax is partly overcome and, on the other

hand, the operation is committed to ironing out small inaccuracies in remittances. Remittances of too much cash, for example, are likely to occur in catalog orders because of the number of items per order and the resulting possibility that one or more items ordered may be out of stock. This situation, which for business reasons is kept to a minimum, nevertheless provides cash with which sales tax errors can sometimes be corrected before the balance is returned. An additional factor which makes the collection problem somewhat more manageable for the catalog house is that it is more likely than a spot-ad operation to have regular repeat orders, which afford the cooperative customer a convenient opportunity to make good a sales tax deficiency or other underpayment noted to him with his last order. For the major catalog house, then, it appears that although the responsibility to collect sales taxes causes clerical work and some losses, these problems are small when compared to similar problems handled in the regular course of business. (*Report*, pp. 771, 772)

The above observation totally discredits the impact of the economic, or pragmatic practical argument National seeks to make in this Court. Moreover, appearing in the same section of the Report by way of "Summary And Conclusions" two presently existing problems and inequities which would favorably be resolved by an affirmative ruling on behalf of the State in this case are indicated. The Report indicates the prevailing tax free sanctuary stitution enjoyed by mail order houses [28] and the resulting

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28. "A special problem is presented by deliveries tax free from across a sales tax boarder". (*Report*, p. 776).

unfairness to local merchants and those few mail order firms which honor their obligations.[29]

29. "Mail-order operations comprise another type of retailing which sometimes receives tax shelter from State lines. Much of this business is concentrated in the large catalog houses. Among these, the firms with nationwide retail outlets are now charging sales tax just about wherever they ship. The others charge no tax where they have no outlets. Whatever it may be worth in diversion of customers, the result is a disparity between such firms and the mail-order houses and local merchants which do collect tax." (*Report* p. 777)

C. There Is No Limitation Upon The Jurisdiction Of The State To Require Extraterritorial Collection Of Its Use Tax In The Circumstances Of This Case, And Possible Congressional Action Can And Should Have No Effect Upon This Court's Present Ruling On The Constitutional Issues Now Befort It.

The reasoning of National's corresponding argument does not obtain when subjected to the most peripheral of legal scrutiny. To argue that this Court eschew deciding a constitutional issue now properly before it on the basis Congress *may* pass a statute having some future effect on similar transactions is patently without merit.

Admittedly if this were a question concerning the interpretation of a congressional statute National could argue congressional intent incident and relating to the passage of the particular statute. However, here we are concerned not with a statute, but constitutional provisions, provisions which are properly within the province of this Court and not Congress to interpret. Even assuming an involvement of congressional intent, it should be presented in the form of a statute and not, as here suggested, a *possible* statute.

Actually in the posture of this case Illinois can realize some succor from the possible legislation. Preforce, the draftors of the legislation would not go through the motions of suggesting an unnecessary bill. This bill would not have been drafted in the face of a belief by its draftors that this Court would resolve this case in favor of the mail order house. Only upon a belief and realization that the present facts present a sufficient legal nexus would such a bill have been drafted.

Congress can hardly be said to have demonstrated marked alacrity in passing legislation similar to that sug-

gested by H.R. 16491. We respectfully suggest that passage of this bill or any other similar type bill, is still at best a possibility somewhat removed in point of time.

Admittedly if H.R. 16491 is passed it will from its effective date preclude further use tax collections under the circumstances of this case. However, even if passed tomorrow it could have no adverse effect on the present claim and suit.

National, by its argument, would have this Court penalize Illinois notwithstanding the manifest fairness and non-discriminatory nature of the Illinois tax system. Illinois would be penalized solely upon the possibility that Congress *may* pass a statute aimed to curb abuses which themselves do not exist in the posture of the present case or related to the Illinois taxing statutes.

CONCLUSION

For the reasons urged herein it is respectfully submitted that the judgment of the Supreme Court of Illinois should be affirmed.

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